EXHIBIT C

EXHIBIT G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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TAL PROPERTIES of POMONA LLC,

Plaintiff,

-against- 17 Civ. 2928(CS)

VILLAGE of POMONA, et al.,

Defendants.

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United States Courthouse
White Plains, New York

January 10, 2018

B e f o r e:

HON. CATHY SEIBEL,
District Court Judge

A P P E A R A N C E S:

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P R O C E E D I N G S

THE COURT: Hi, Mr. Sussman.

MR. SUSSMAN: Yes, your Honor.

THE COURT: You sure you want to do this, Mr. Sussman? You can always order the transcript.

MR. SUSSMAN: I haven't heard anything. I'll stay on the line. Thank you. Has anybody spoken? I haven't heard anything.

THE COURT: Nobody said anything. I understand you're dealing with a personal matter, if you would --

MR. SUSSMAN: I'm sorry I'm not there. Thank you.

THE COURT: I'm giving you an out if you --

MR. SUSSMAN: I understand. I appreciate it.

THE COURT: All right.

MR. SUSSMAN: I'm okay just sitting here talking.

THE COURT: And Ms. Mastellone, you can have a seat.

MS. MASTELLONE: Thank you, your Honor.

THE COURT: Any last words anybody wants to add beyond what's in the motion papers?

MS. MASTELLONE: No. Thank you, your Honor.

THE COURT: All right, so I'm just going to read my decision.

It's a motion the dismiss the second amended complaint or SAC. I accept as true the facts, although not the conclusions in the SAC. Plaintiff is TAL Properties of Pamona,

which is an LLC that conducts business in Rockland County. The sole owner of TAL is Avrohom Manes, who's an Orthodox Jew residing in Rockland County. He's not named in the caption as a plaintiff, but he is named in the body. So I am assuming it is intended he is a plaintiff.

The defendant, Village of Pomona, is in Rockland County. The defendant, Brent Yagel is the mayor of the Village and the defendant Doris Ulman is the Village attorney. The caption doesn't name her as a defendant, but the body does, so I assume she's meant to be a defendant.

Plaintiffs sue both Yagel and Ulman in both their official and individual capacities. Plaintiffs allege that both individual defendants knew that Manes was Jewish.

In December 2015, plaintiffs bought a residential home, which I'm going to call the property, at 22 High Mountain Road in the Village. In January 2016, they made repairs to the property. The same month the Village building inspector, Louis Zummo, inspected the property and advised plaintiffs that the work had been completed in accordance with the applicable codes and regs and that a C of O should be issued, a certificate of occupancy should be issued. Despite plaintiffs qualifying for the issuance of a C of O, Yagel and Ulman are alleged to have directed Zummo not to issue the certificate. They are alleged to have acted in contravention of the Village Construction Code, Chapter 47-10, which, according to plaintiffs, requires

the issuance of the CO because the property complied with the applicable code requirements.

In seeking to justify the Village's refusal to issue the CO, Yagel, acting through Ulman, claimed that a previous owner of the property owed the Village $6,379.34 and demanded that plaintiffs pay this debt in exchange for the CO. At no time did defendants claim the plaintiffs incurred the debt or have any basis for such a claim. Plaintiffs allege that refusing to grant the CO on that basis is not based in law, does not represent the Village's general practice and is without precedent. Yagel and Ulman allegedly failed to take any action to collect the sum of 6300 and change from the previous owner, who is not Jewish, and that they allegedly permitted the previous owner's developer bond to lapse without collection even though the developer failed to develop and complete roads secured by the bond.

During the time plaintiffs sought to sell the home, defendants are alleged to have repeatedly used unspecified false explanations for delays in the issuance of the CO, thus preventing plaintiffs from alienating their property. Plaintiffs attempted to grade slopes on the property to create usable backyard space and to enhance the property's value. The Village engineer worked with plaintiff's engineer to develop a plan to address the slopes and initially approved the plan. But after being pressured by Yagel and Ulman, the Village

engineer retracted his approval, disavowed the plan and imposed costly conditions on plaintiffs.

Zummo then advised the engineer, although the SAC does not say whether that refers to the Village engineer or plaintiff's engineer, that he would longer participate in this allegedly selective enforcement against plaintiffs. Zummo and the Village clerk have both told Manes that Yagel and Ulman advised them to give Manes a hard time with anything he needed. The conditions imposed, which owners of "similarly sloped" properties allegedly did not have to satisfy, required plaintiffs to post a bond to insure that plaintiffs did not damage their neighbor's property, which plaintiffs claim was highly unusual; show that the original surveyor whose work product plaintiffs used in their submission authorized plaintiff to use his work, which, according to plaintiffs, was highly unusual, as land surveys are typically relied upon without such authorization; and test the compressed fill they used for grading in a manner inconsistent with requirements imposed on others using such fill for similar projects.

Although plaintiffs agreed to comply with these requirements, the Village still rejected plaintiff's application and did not issue a permit for the grading work.

In the fall of 2016, plaintiffs entered into a contract to sell the property. By this point, the Village had dropped any claim that plaintiffs owed the debt incurred by the

previous owner and the Village had issued a CO. Following the sale of the property, the Village threatened to withdraw the CO if plaintiffs failed to sign an agreement acknowledging, among other things, that the road accessing the property was not a Village road and that its maintenance was the sole responsibility of the property's owner. Plaintiffs allege this requirement was contrary to Village practice, not authorized by the Village code and another *ultra vires* action taken by the Village dictated by Yagel and Ulman to impede and complicate plaintiff's alienation of the property.

Plaintiffs allege that the delays in issuing the required CO and the discriminatory imposition of grading requirements cost plaintiff to incur a substantial decline in the sales price of the property and prevented plaintiffs from using the proceeds from a sale for other profitable business opportunities.

TAL filed this lawsuit in state Court on March 16, 2017 and defendants removed it to federal court on April 21, 2017. Defendant sent a letter requesting a premotion conference on May 12 and plaintiffs responded by filing the first amended complaint on July 5th. The first amended complaint added Manes as a plaintiff and removed many defendants. Defendants then asked for a premotion conference again on July 26. Plaintiff responded by letter on July 31, and we had a conference on August 25. Plaintiffs then filed

the SAC on September 7, it contains two claims, both under Section 1983, one for violation of the Equal Protection Clause of the Fourteenth Amendment based on the theory that defendants engaged in selective enforcement against plaintiffs based on Manes' religion; and, second, a claim that by intentionally imposing harsher conditions on plaintiffs than on non-Jewish developers, defendants burdened the free exercise of Manes's religion. Defendants moved to dismiss on October 16.

On a Rule 12(b) motion, the familiar standards of *Iqbal* and *Twombly* apply. Defendants raise four grounds for dismissal: One that plaintiffs lack standing to demand damages; two, that they failed to sufficiently plead the elements of both constitutional violations; three, that the individual defendants are entitled to qualified immunity, and, four, that plaintiffs failed to sufficiently plead *Monell* liability.

The first argument is that plaintiffs lack standing to sue at least insofar as they allege claims arising from the Village's unsuccessful attempt to collect the debt incurred by the previous property owner. If the claim in this case were that the Village's collection attempt violated state law or a federal statute, defendants might be right that plaintiffs had suffered no concrete injury. But plaintiffs are not alleging concrete injury from having had to make a wrongful payment. Plaintiffs are alleging that they suffered concrete injury,

that is, lost money, from being subjected to unfair impediments in connection with their CO on the basis of plaintiff, Manes's, religion and that the claim that plaintiffs owed the prior owner's debt was a pretext for that discrimination. If they could so prove, the violation of their equal protection rights would be a sufficient injury. Likewise, contrary to defendants' argument, plaintiffs are not claiming injury from an otherwise proper land use approval process that just took too long as one would in a due process or takings case. Plaintiffs are alleging discrimination based on religion, so the loss of money and emotional stress they allege suffice to demonstrate standing.

I will now address each alleged constitutional violation in turn.

First, the selective enforcement claim. A plaintiff can bring a 1983 claim under the Equal Protection Clause which, among other things, bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or malicious or bad faith intent to injure a person. *Bizzarro versus Miranda*, 394 F.3D 82, 86. To properly state a claim for selective enforcement, plaintiff has to show, not surprisingly, that, one, the person compared with others similarly situated

was selectively treated; and, two, that the selective treatment was based on impermissible consideration such as religion. *LeClair versus Saunders*, 627 F.2d 606, 609-10; *accord Zahra Town of Southold*, 48 F.3d 674, 683. To satisfy the first prong plaintiffs must, at a minimum, plausibly allege comparators that are similarly situated in all material respects. *Sharp versus City of New York*, 2013 WL 2356063 at *4 (E.D.N.Y., May 29, 2013) *aff'd* 560 F.App'x 78. Exact correlations are not required, but at least a rough similarity is. *Mosdos Chofetz Chaim Inc. versus Wesley Hills*, 815 F.Supp. 2d 679, 698 (S.D.N.Y., 2011), where the Court said that, at the motion to dismiss stage, the court must still determine whether, based on the plaintiff's allegations in the complaint, it is plausible that a jury could ultimately determine that the comparators are similarly situated. Conclusory allegations of selective treatment are insufficient to state an equal protection claim. *Bishop versus Best Buy* 2010 WL 4159566 at *11 (S.D.N.Y., October 13, 2010), *on reconsideration* 2011 WL 4011449, (September 8, 2011), *aff'd* 518 F.App'x 55. *See Segreto versus Town of Islip*, 2014 WL 737531 at *7 (Eastern District of New York, February 24, 2014) where the court dismissed an equal protection claim where plaintiffs merely alleged that others were allowed to get permits but it was unclear whether those properties had any circumstances similar to plaintiff. To satisfy the second prong, plaintiff can offer both direct and

circumstantial evidence of discriminatory intent. *Chabad Lubavitch of Litchfield County versus Litchfield Historic District*, 768 F.3d 183, 199, but must offer more than conclusory allegations of disparate treatment and personal opinions that such treatment was motivated by discriminatory intent. *Morales versus New York* F.Supp. 3d 256, 275 (S.D.N.Y., 2014).

Plaintiffs appear to have alleged three incidents of selective treatment: One, defendants' delay in issuing a CO, including defendants' request that plaintiffs pay the debt on the property incurred by the previous owner; two, defendants' requirement that plaintiffs fulfill certain conditions before receiving a grading permit for their property; and, three, defendants' request the plaintiff sign an agreement in exchange for maintaining the certificate of occupancy. Other property owners on High Mountain Road are similarly situated and were not subject to similar treatment.

Plaintiff's allegations regarding similarly situated persons are conclusory. Although the SAC details plaintiff's travails in obtaining a certificate of occupancy and a grading permit, it does not provide specific examples of similarly situated persons applying for a CO or a grading permit, much less examples of similarly situated persons receiving preferential treatment. *See Amid versus Village of Old Brookville*, 2013 WL 52772 at *6 (E.D.N.Y., February 7, 2016),

where the Court said, "Where a plaintiff claims to have been treated unfairly in a zoning/building context, he must plead specific examples of applications and hearings that were similar to plaintiff's application and demonstrative of the disparate treatment."

Although the similarly situated standard for selective enforcement claim is less stringent than the one for a class of one claim, *see, e.g., New Page at 63 Main versus Incorporated Village of Sag Harbor*, 2016 WL 8653493 at *20-21 (E.D.N.Y., March 19, 2016); *Mosdos*, 815 F.Supp. 2d at 695-96, plaintiffs must still provide more than conclusory allegations and speculation that they were treated less favorably. *Rodrigues versus Incorporated Village of Mineola*, 2017 WL 2616937 at *6 (E.D.N.Y., June 16, 2017) is an example of a court holding the plaintiffs adequately alleged that a similarly situated comparator was treated differently than plaintiffs. In that case, plaintiffs listed six neighboring businesses that engaged in the same activities as plaintiffs that is operating outdoor facilities on their property, but unlike plaintiffs, the other businesses operated outdoor facilities without frequent visits from Village inspectors and some operated without permits. The plaintiffs also allege that the Village issued plaintiffs a summons for allowing the accumulation of filth, dirt, concrete dust and stones on a public place, but the Village did not issue a summons to a

neighboring business even though that same business had spilled concrete onto public streets. That's *Rodrigues* at *6.

In another case, in contrast, *Joglo Realties Inc. versus Seggos*, 229 F.Supp. 3d 146, 157 (E.D.N.Y., 2017), the court dismissed plaintiff's selective enforcement claim where plaintiffs allege their neighbors had violated the same environmental regulations plaintiffs were accused of violating, because the plaintiffs "failed to provide the Court with factual details that would allow the Court to infer that their neighbors have violated the relevant laws and regulations to such an extent that the violations could be fairly be compared with plaintiff's alleged infractions."

Plaintiff's allegations in this case are not nearly as detailed as the allegations in *Rodrigues* or even *Joglo*. As to the previous owner, plaintiffs do not allege that the previous owner ever applied for a certificate of occupancy. As to the other property owners on High Mountain Road, even if the conclusory allegations that their properties were, "similarly sloped," were sufficient, which it's not, plaintiffs do not allege that these property owners ever applied for grading permits or that they received grading permits with preferential conditions as compared to those imposed on plaintiffs. Likewise while plaintiffs allege that it was not Village practice to require an agreement that plaintiffs access road was not a Village road, they do not allege -- first they don't

allege that they were not properly responsible for that road, but moreover they don't allege that any other property owner had a similar access road or that responsibility for another access road was ever in dispute. Plaintiffs provide no facts about the comparator's properties or activities from which the court could infer they were, in fact, similarly situated but treated better in their interactions with defendants. *See New Page* at *21, where the court dismissed an equal protection claim under either selective prosecution or class-of-one theories where the plaintiff neither identified a similarly situated restaurant nor offered any non-conclusory allegations suggesting all the neighboring in all material respects. *Segreto* at *7, where vague allegations regarding the neighbors were insufficient given that there were no allegations that the neighbors had received permits that were denied to plaintiff and it was unclear whether the properties were similar. *Parkash versus Town of Southeast*, 2011 WL 5142669 *8 (S.D.N.Y., September 30, 2011) where the conclusory reference to unspecified similarly situated persons without accompanying examples was insufficient to state a selective enforcement claim, *aff'd* 468 F.App'x 80; and *cf. Whittle versus County of Sullivan*, 2017 WL 5197154 at *7-8, one of my cases from November 8th of last year, where allegations of the similarly situated comparator were inadequate in an employment discrimination case where the plaintiff failed to provide facts

as to which colleagues submitted similar acts but were not fired, what those acts were, to whom those employees reported, what their responsibilities were and how their disciplinary histories compared to plaintiffs. By merely saying the comparators are similar without facts rendering that conclusion plausible, plaintiffs here have alleged but have not shown entitlement to relief. *See Iqbal* 566 U.S. 679. Accordingly they failed to plausibly allege the first prong of the selective enforcement claim.

They've also failed to plausibly allege the second prong; namely, that the defendants' actions were motivated by religious-based animus. The allegations in that regard are conclusory, e.g., paragraph 20 says, "Indeed, out of animus for plaintiffs based on the religion of plaintiff's principal..." Paragraph 43 says, "The religiously motivated discrimination to which defendant subjected plaintiff..." But there are no facts supporting these conclusions. They are nothing more than a personal opinion that defendants' conduct was motivated by intent to discriminate on the basis of religion, which is not enough to carry a selective enforcement claim past the motion to dismiss claim. *See Morales*, 22 F.Supp. 3d at 275. Plaintiffs must do more than allege that defendants knew Manes was Jewish and that something bad happened to plaintiffs. Plaintiffs do not allege that the defendants made comments to or about Manes suggesting discriminatory animus. Plaintiffs

fail to even allege circumstantial evidence of discriminatory intent, such as allegations suggesting history of religious discrimination or, as discussed above, facts suggesting that defendants favored similarly situated non-Jewish people, *cf. Hamzik versus Office for People with Developmental Disabilities*, 859 F.Supp. 2d 265, 279 (Northern District, 2012). Plaintiffs have therefore failed to state a plausible selective enforcement claim.

Turning now to the free exercise claim. The SAC alleges that the defendants' burdened the free exercise of religion in violation of the First Amendment which is applicable to the states through the Fourteenth Amendment. *Central Rabbinical Congress versus New York City* 763 F.3d 183, 193. The protections of the free exercise clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. *Church of the Lukumi Babalu Aye versus City of Hialeah*, 508 U.S. 520, 532. The government may, however, enact generally applicable laws that happen to burden religious practice. *Newdow versus Peterson*, 753 F.3d 105, 108. A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if it has the incidental effect of burdening a particular religious practice. *Lukumi* 508 U.S. at 531.

Defendants argue that the First Amendment claim rises

or falls with the equal protection claim, and plaintiffs do not dispute or even address this argument. I agree with the parties that on the facts here the claims do rise and fall together, because both depend on plaintiffs having plausibly alleged religious-based animus, which they failed to do. Plaintiffs have not alleged that the conditions and requirements imposed by defendants are not neutral or of general applicability or that they are designed to interfere with religious observation. Plaintiffs have merely set forth the conclusory allegations of religious-based animus that I discussed earlier and the conclusory assertion that the defendants burdened the free exercise of Manes's religion. See paragraph 49. Plaintiffs failed to allege that the conditions and requirements imposed by defendants substantially burden religious freedom or interfere with religious observation. *See Skoros versus City of New York*, 437 F.3d 1, 39, where the court said, absent a showing that the purpose of the challenged action was to impugn religious beliefs or restrict religious practices, free exercise claim will only be sustained if the government has placed a substantial burden on the observation of a central religious belief without a compelling governmental interest justifying the burden. A substantial interest exists where the state puts substantial pressure on an adherent to modify his behavior and violate his beliefs. *Newdow* 753 F.3d at 109; *see Jolly versus Coughlin*, 468, 476-77. Plaintiffs

make no attempt aside from the conclusory allegations mentioned earlier to allege a substantial burden on religious freedom. Even their sole conclusory allegation in paragraph 49 alleges only a burden, not a substantial one, and there are no facts rendering that conclusion plausible.

Accordingly, plaintiffs have failed to state a plausible free exercise claim.

In light of my disposition, I do not need to address of the qualified immunity or *Monell*.

In this case, taking the allegations of the SAC as true, as I must, plaintiffs have done a fine job of showing that the defendants indeed gave plaintiffs a hard time as alleged in paragraph 35 and treated them unfairly in ways for which they might have been entitled to address in an appropriate state court, but they have not alleged facts suggesting that they were treated unfairly because Manes was Jewish. They are fallen victim to the fallacy that, because they belong to a protected class, it is plausible that anything negative that happens to them is because of their membership in that class. *See Grillo versus New York City Transit Authority*, 291 F.3d 231, 235, where the circuit said that, even if plaintiff's highly dubious claim that he was unfairly singled out for punishment by the instructors is credited, plaintiff has done little more than cite to his alleged mistreatment and asked the Court to conclude that it must have been related to

his race; and *Varughese versus Mount Sinai*, 2015 WL 1499618 at *42 (S.D.N.Y., March 27, 2015), where the Court said it was a fallacy for the plaintiff to say, I belong to a protected class, something bad happened to me at work, therefore it must have occurred because I belong to a protected class. Those cases are equally applicable here. That reasoning is not sufficient. While it's conceivable that plaintiff's treatment here was based on religion, plaintiffs have not provided sufficient facts to nudge that conclusion over the line from the conceivable to the plausible. *See Iqbal* at 680. Plaintiffs must provide specifics showing a plausible constitutional violation in order to overcome the otherwise proper reluctance of federal courts to get involved in local land use disputes, *cf. Filipowski versus Village of Greenwood Lake*, 2013 WL 3357174 at *9 (S.D.N.Y., July 3, 2013).

I in no way intend to condone the imposition of unfair roadblocks in connection with land use, but such roadblocks are not necessarily redressable in federal court as civil rights violations. Just saying that there are other properties that are similar in some respect does not suffice to plausibly allege that those properties are roughly equivalent or similar in all material respects. If a plaintiff cannot be bothered to provide facts as opposed to conclusions regarding other purportedly similarly situated properties and how their owners were treated by the defendants, or if a plaintiff cannot

do so because no such facts exist, that plaintiff will have to confine itself to the ordinary state law remedies available to aggrieved property owners rather than a federal civil rights remedy.

Finally, as to leave to amend, it should be given freely when justice so requires. It's within the sound discretion of the Court to grant or deny leave to amend, and though liberally granted, it may properly be denied for undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility. *See McCarthy versus Dunne and Bradstreet*, 482 F.3d 184, 200; *Ruotolo versus City of New York*, 514 F.3d 184, 191.

Here plaintiffs have already amended twice after having the benefit of two premotion letters from defendants outlining their proposed ground for dismissal and my observations during the August 25, 2017 conference which focused on the complaint being strong on allegations of unfairness but weak on that unfairness being religiously based. Plaintiff's failure the fix deficiencies in the previous pleadings after being provided notice of them is alone sufficient ground to deny leave to amend *sua sponte*. *See In Re Eaton Vance* 380 F.Supp. 2d 222, 242 (S.D.N.Y., 2005) *aff'd* 481 F.3d 110, 118 and *Payne versus Malemathew*, 2011 WL 3043920 at *5 (S.D.N.Y., July 22, 2011).

Further, plaintiffs have not asked to amend again or otherwise suggested that they are in possession of facts that would cure the deficiencies identified in this opinion.

Accordingly, I decline to grant leave to amend *sua sponte*. *See TechnoMarine versus Giftports*, 758 F.3d 493, 505; *Gallop versus Cheney*, 642 F.3d 364, 369; *see also Loreley Financial versus Wells Fargo*, 797 F.3d 160, 190.

So, for the reasons just discussed, the motion to dismiss is granted.

The clerk of the court is to terminate motion number 17 and close the case.

Sorry to drop bad news on you, Mr. Sussman, while you're in a bad place, but I think that takes care of our business here. I'll do a brief order of the saying that, for the reasons set forth on the record today, the motion is granted.

All right, thank you both.

MS. MASTELLONE: Thank you, your Honor.

THE COURT: Best of luck, Mr. Sussman.

(Proceedings concluded)